

MEMORANDUM OF UNDERSTANDING

Integration Process for the Bay Delta Conservation Plan

National Environmental Policy Act (42 U.S.C. 4321 et seq)

and

Clean Water Act Section 404 (33 U.S.C. 1344)

and

Rivers and Harbors Act of 1899 Section 10 (33 U.S.C. 403)

and

Rivers and Harbors Act of 1899 Section 14 (33 U.S.C. 408)

Among:

Bureau of Reclamation

California Department of Water Resources

National Marine Fisheries Service

United States Fish and Wildlife Service

United States Environmental Protection Agency

United States Army Corps of Engineers

[Insert Current Date]

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Section I. Introduction

The parties to this Memorandum of Understanding (MOU) are the California Department of Water Resources (DWR), U.S. Fish and Wildlife Service (USFWS), National Marine Fisheries Service (NMFS), Bureau of Reclamation (Reclamation), U.S. Army Corps of Engineers (USACE), and the U.S. Environmental Protection Agency (EPA). The goal of this MOU is to establish an understanding of processing requirements, and thus to facilitate compliance with the National Environmental Policy Act (NEPA) (42 U.S.C. section 4321 *et seq*) for the purpose of issuing permits under the Clean Water Act section 404 (33 U.S.C. section 1344) (hereinafter “CWA Section 404”), Rivers and Harbors Act of 1899 section 10 (33 U.S.C. section 403) (hereinafter referred to as “RHA Section 10”), and Rivers and Harbors Act of 1899 section 14 (33 U.S.C. section 408) (hereinafter referred to as “Section 408”).

1. **The Bay Delta Conservation Plan (BDCP).** The BDCP is a habitat conservation plan (HCP) being prepared to meet requirements of the Endangered Species Act (ESA), the California Endangered Species Act (CESA), and the State of California’s Natural Community Conservation Planning Act (NCCPA). DWR intends to apply for ESA and CESA take permits for water operations, conveyance, and restoration activities in the Delta as described in the BDCP. These take authorizations would allow take of threatened and endangered species resulting from covered activities and conservation measures described in the BDCP. Conservation measures and take provisions under ESA and CESA will be identified through planning, and NEPA and CEQA compliance processes; to include those associated with water operations of the State Water Project (SWP) as operated by DWR, and certain Mirant Delta LLC (Mirant Delta) power plants. Additionally, if feasible, the BDCP will be used as the basis for ESA and CESA compliance by Reclamation, including compliance with Section 7 of ESA in coordination with the USFWS and NMFS for operation of the Central Valley Project (CVP).

A number of other agencies and organizations are involved in development of the BDCP Environmental Impact Report/Environmental Impact Statement (EIR/EIS) including, but not limited to, the U.S. Department of Agriculture, Council on Environmental Quality, U.S. Geological Survey, California Department of Fish and Game, California Department of Transportation, California Natural Resources Agency, California Delta Stewardship Commission, California State Water Resources Control Board, California Central Valley Regional Water Quality Control Board, California Central Valley Flood Protection Board, State and Federal Contractors Water Agency, San Luis & Delta-Mendota Water Authority, State Water Project Contractors Authority, Metropolitan Water District of Southern California, Kern County Water Agency, Westlands Water District, Santa Clara

Valley Water District, Environmental Defense Fund, The Nature Conservancy, Contra Costa County, Zone 7 Water Agency, Mirant Delta LLC, and Alameda County Flood Control & Water Conservation District. None of these other agencies and organizations have control by statute over the content of the BDCP EIR/EIS and, therefore, none are party to this MOU.

2. **The BDCP EIR/EIS.** An EIR/EIS is being prepared for the BDCP for the purpose of compliance with NEPA and the California Environmental Quality Act (CEQA) by the NEPA and CEQA Lead Agencies. The status of planning efforts and the level of detail for separate actions of the BDCP varies; such that the BDCP EIR/EIS analyzes actions for the conveyance and operations elements of the BDCP at a site-specific or project level, and analyzes habitat-restoration actions at a programmatic level. As appropriate, actions analyzed in the BDCP EIR/EIS will require subsequent compliance, including compliance with NEPA, CEQA, RHA Section 10, Section 408, CWA Section 404, and all other applicable regulations, when planning efforts provide site-specific detail or indicate there are substantive changes.

The BDCP EIR/EIS is intended to serve as the primary method of NEPA/CEQA compliance for a significant number of regulatory and operational decisions, including, but not limited to: (1) decisions to issue ESA Section 10(a)(1)(b) and State Fish & Game take permits for the BDCP; (2) decisions by DWR and Reclamation to implement the BDCP, including new conveyance and operations of the SWP and CVP, (3) decisions by the State Water Quality Control Board to issue a change in the point of diversion permit to the CVP and SWP and by Regional Water Quality Control Board to issue Clean Water Act Section 401 certification for the BDCP activities; and (4) to the extent possible, to support permitting actions by the USACE.

3. **This MOU.** As stated above, the purpose of this MOU is to establish an understanding of the processing requirements as well as to facilitate compliance with the NEPA, for purposes of issuing permits under CWA Section 404, RHA Section 10, and Section 408 by the USACE. Specifically, this MOU is intended to facilitate coordination of the USACE permit application review process for any necessary (1) CWA Section 404 permit applications to discharge dredged or fill material into waters of the U.S., (2) RHA Section 10 permit applications for work in, over, or under navigable waters of the U.S., including the diversion of water from navigable waters of the U.S., and (3) Section 408 requests for permission for alteration or permanent occupation of existing USACE projects.

This MOU is the formal commitment of Signatory Agencies for early and continuous involvement in BDCP EIR/EIS development. Throughout this MOU process, all Signatory

Agencies share responsibility for providing informal “heads up” of pending problems/potential issues as early as possible.

USFWS, NMFS, Reclamation, and DWR agree that a separate NEPA/CEQA and CWA 404 process for potential changes in facilities and operations at the Fremont Weir and Yolo Bypass will be discussed with the USACE within three months of the signing of this MOU. The Federal Lead Agencies will coordinate with the Central Valley Flood Protection Board and DWR who serve as the owner and maintainer of the facilities on planning any changes in facilities and/or operation of the Fremont Weir and Yolo Bypass.

4. Agencies:

Signatory Agencies: California Department of Water Resources, U.S. Fish and Wildlife Service, National Marine Fisheries Service, Bureau of Reclamation, U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency.

NEPA and CEQA Lead Agencies: California Department of Water Resources, U.S. Fish and Wildlife Service, National Marine Fisheries Service, and Bureau of Reclamation.

NEPA Lead Federal Agencies: U.S. Fish and Wildlife Service, National Marine Fisheries Service, and Bureau of Reclamation.

NEPA Federal Cooperating Agencies: U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency.

Section II. Overview

This MOU has the following components:

1. **Applicability of CWA Section 404, RHA Section 10, and Section 408 (Section III).** This section provides general guidance on the applicability of CWA Section 404, RHA Section 10, and Section 408
2. **Checkpoints, Milestones, and Decision Points (Section IV).** This section describes the major checkpoints, milestones, and decision points for permitting by the USACE.
3. **Modification and Termination (Section V).** This section provides details on modification and termination of the MOU.
4. **General Provisions (Section VI).**). This section provides details on the legal import of this document.

5. **Effective Date and Duration (Section VII).** This final section provides details on when the MOU becomes effective and the duration of the legal force and effect of the MOU.

Section III. Applicability of CWA Section 404, RHA Section 10, and Section 408

This section provides general guidance on the applicability of CWA Section 404, RHA Section 10, and Section 408.

1. **CWA Section 404.** The U.S. Army Corps of Engineers, through the Regulatory Program, administers and enforces Section 404 of the Clean Water Act (CWA). Under CWA Section 404, a permit is required for the discharge of dredged or fill material into waters of the United States.
2. **RHA Section 10.** The U.S. Army Corps of Engineers, through the Regulatory Program, administers and enforces Section 10 of the Rivers and Harbors Act of 1899 (RHA). Under RHA Section 10, a permit is required for work or structures in, over or under navigable waters of the United States.
3. **Section 408.** Section 408 provides that the Secretary of the Army may, on recommendation of the Chief of Engineers, grant permission for the alteration or permanent occupation of a public work so long as that alteration or occupation is not injurious to the public interest and will not impair the usefulness of the work. Permission for major alterations which include changes the authorized purpose, scope, or functioning of a project, must be approved at Headquarters (HQ) USACE. Permission for minor, low impact modifications has been further delegated to the District Engineer. This MOU focuses on major alterations that require approval at HQUSACE. The primary focus of the USACE's Section 408 review will be to ensure that there are no adverse impacts to the flood risk reduction system.

Section IV. Checkpoints, Products, and Milestones

This section describes the major checkpoints, products, and/or milestones of the processes supporting permit actions of the USACE.

1. **CWA Section 404 and RHA Section 10.** There are four checkpoints which punctuate ongoing coordination efforts. Coordination meetings, discussed below, are generally appropriate for each of the checkpoints. Additionally, USACE will provide a written response and updated, cumulative, life-cycle guidance memorandum for each of the checkpoints below. These checkpoints are:

- a. Purpose and Need – NEPA and CEQA Lead Federal Agencies’ definition of the purpose and need for the BDCP under NEPA, and the USACE definition of the basic and overall project purpose under CWA Section 404 for the projects for which the BDCP EIR/EIS would provide NEPA compliance for USACE CWA Section 404 permit decisions;¹
 - b. Scoping –Identification of and consensus on baseline, without project conditions and future without project conditions;
 - c. Alternatives -Identification of the Range of Alternatives to be evaluated in the EIR/EIS for the projects; and
 - d. Preliminary Determination by USACE that the scope of the NEPA analysis includes the USACE Least Environmentally Damaging Practicable Alternative (LEDPA), and that the Draft Mitigation Plans (DMP) for the projects are consistent with applicable USACE regulations.
2. **Section 408.** In order for the USACE to process a major alteration under Section 408, several products must be developed. Completion of these products marks milestones in the Section 408 process. There are two documents which currently outline the process and milestones for major alterations: (1) 17 November 2008 – Memorandum from Director of Civil Works – Clarification Guidance on the Policy and Procedural Guidance for the Approval of Modification and Alteration of Corps of Engineers Projects; and (2) 23 October 2006 – Memorandum from Director of Civil Works – Policy and Procedural Guidance for the Approval of Modification and Alteration of Corps of Engineers Projects. The list below summarizes the most significant products and milestones:
- a. Request for Permission to Alter a Federal Project – The non-Federal sponsor must submit a letter to the USACE requesting permission to alter a Federal a Federal project.
 - b. NEPA – The NEPA Lead Agencies must prepare, in coordination with USACE, a NEPA document that includes sufficient detail to support 65 percent designs, or preconstruction engineering and design. USACE must determine that the NEPA document provides the necessary information to support USACE’s decision that the alteration is not injurious to the public interest and does not impair the

¹ The requirements under NEPA for a “purpose and need” statement are discussed at 40 CFR Section 1502.13. The “basic and overall project purpose” is discussed generally at 40 CFR Section 230.10 and in more detail in the Corps of Engineers Standard Operating Procedures, 2009, at pages 15-16.

usefulness of the project. If the BDCP EIR/EIS does not include sufficient detail to support 65 percent designs, or preconstruction engineering and design, USACE will supplement the BDCP EIR/EIS or require a new EIR/EIS to be prepared as USACE determines appropriate. USACE will prepare and execute its own Record of Decision (ROD) if the NEPA document is demonstrated to be adequate to support the Section 408 decision. NEPA documents, upon which a Section 408 action will be based, require review and acceptance by HQUSACE.

- c. 65 Percent Engineering and Design – The Lead Agencies must prepare 65 percent designs. These designs and basis of these designs must be reviewed by USACE as well as an independent external peer review panel. Hydraulic analyses, including risk and uncertainty, as appropriate, will be required.
 - d. Safety Assurance Review – A Safety Assurance Review (SAR), also known as a Type II Independent External Peer Review, is required during design and construction. A SAR Plan must be prepared by the Lead Agencies and must include a proposed panel of independent and external reviewers. The SAR Plan must be approved by USACE.
 - e. Project Summary Report – The Lead Agencies must prepare a Project Summary Report documenting the scope of the alteration and summarizing the required analyses. The Project Summary Reports shall be supported with full engineering analyses and documentation.
 - f. USACE Sacramento District transmits Section 408 recommendation and supporting documents through USACE South Pacific Division to HQUSACE.
 - g. Approval and Letter of Permission – Approval by HQUSACE is based upon 60 percent designs or greater and thus does not provide the Lead Agencies with permission to begin construction. The District will issue a Letter of Permission to the project sponsor which allow for the start of construction. The District will not issue a Letter of Permission until final, 100 percent designs have been submitted by the Lead Agencies and approved by the District. This Letter of Permission will include multiple conditions that the sponsor must comply with.
3. **Coordination Meetings.** Coordination meetings provide an opportunity for exchange of information about the BDCP and its progress. Further, coordination meetings allow for the NEPA Federal Cooperating Agencies and NEPA and CEQA Lead Agencies to identify and discuss what additional information is necessary for upcoming checkpoints, milestones, or decision points. Coordination meetings can and should be held when

either the NEPA and CEQA Lead Agencies or NEPA Federal Cooperating Agencies feel necessary or appropriate. In person meetings are preferred. In preparation for coordination meetings, the agency calling the meeting shall prepare an agenda and read-ahead prior to the meeting. The agency calling the meeting shall also prepare meeting minutes and distribute for concurrence by respective attendees.

Section V. Modification and Termination

1. Modification.

- a. Any Signatory Agency may propose modifications to this MOU.
- b. The Signatory Agencies will have 30 calendar days from receipt of the proposed modification(s) to submit comments. Upon written acceptance of a proposal by all Signatory Agencies, the NEPA and CEQA Lead Agencies will circulate an MOU amendment for execution.
- c. The amended MOU will become effective 15 calendar days after execution by the last Signatory Agency and will supersede any previous version of the MOU.

2. Termination. This MOU may be terminated by any Signatory Agency upon 30 days written notice to all other Signatory Agencies.

Section VI. General Provisions

1. The MOU does not address all environmental review and permitting requirements. The USACE may also need additional information and analysis beyond what is in the EIR/EIS to complete its permitting processes. The USACE has sole authority to determine if the BDCP EIR/EIS prepared by the NEPA and CEQA Lead Agencies is sufficient for its permitting decisions. This MOU does not require the USACE to adopt the BDCP EIR/EIS. If the BDCP EIR/EIS does not fully meet the needs of USACE for its permit decisions, USACE will supplement the BDCP EIR/EIS or require a new EIR/EIS to be prepared as USACE determines appropriate. This MOU also does not require the USACE to complete its permit processes concurrent with or otherwise synchronized with the signing of Records of Decisions by the NEPA Lead Federal Agencies.
2. The EPA has authority under the Clean Air Act section 309 to review and comment on the NEPA documents of other Federal agencies. This is independent of EPA's role in the MOU.

3. Specific approvals not addressed by this MOU include, but are not limited to, the following: any real estate permissions, CVFPB encroachment permit, Endangered Species Act Section 7 compliance, CWA Section 401 water quality certification, Coastal Zone Management Act consistency determination, National Historic Preservation Act Section 106 compliance, and Department of Transportation Act Section 4(f) compliance.
4. The USACE will not issue Section 404 and/or RHA section 10 permits for a project which also requires Section 408 permission until such time as the USACE Section 408 review process is completed and a decision has been made. All USACE permits and permissions would then be transmitted together to the applicant.
5. Signatory Agency participation in this process does not imply endorsement of all aspects of a BDCP project or the BDCP itself. Nothing in this MOU is intended to diminish, modify, or otherwise affect the statutory or regulatory authorities of the Signatory Agencies.
6. Documents, data, maps, and other information provided pursuant to this MOU may be pre-decisional (intra-agency or inter-agency memoranda or letters) or privileged Signatory Agency information, or information that is prohibited from disclosure pursuant to applicable law. For public requests of such information, under the Freedom of Information Act or otherwise, the releasing party will notify the other Signatory Agencies within 10 days of the public request and provide an opportunity to comment on whether the information is pre-decisional, privileged, or prohibited from disclosure by applicable law. Prior to release, the releasing Signatory Agency will consider comments and respond to the commenting Signatory Agency.
7. A Signatory Agency's participation in the integration process is not equivalent to serving as a cooperating agency as defined by regulations promulgated by the Council on Environmental Quality, 40 C.F.R. Part 1501, which is a separate process established through a formal written agreement from a Signatory Agency to the NEPA Lead Federal Agency.
8. As required by the Anti-deficiency Act, 31 U.S.C. Sections 1341 and 1342, all commitments made by Federal agencies in this MOU are subject to the availability of appropriated funds. Nothing in this MOU, in and of itself, obligates Federal agencies to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations that would be inconsistent with agency budget priorities. The non-Federal signatory to this MOU agrees not to submit a claim for compensation for services rendered to any Federal agency in connection with any activities it carries out in furtherance of this MOU. This MOU does not exempt the non-

Federal party from Federal policies governing competition for assistance agreements. Any transaction involving reimbursement or contribution of funds between the parties to this MOU will be handled in accordance with applicable laws, regulations, and procedures under separate written agreements.

9. This MOU does not confer any right or benefit, substantive or procedural, enforceable at law or equity, by a party against the United States, its agencies, its officers, or any person.
- 10 The parties recognize that EPA and the USACE have existing agreements on the processes that those agencies will use to collaboratively and expeditiously resolve specific issues in Section 404 permit program implementation. Nothing in this MOU is intended to supersede, expand, or void any part of those existing agreements. If either the EPA or the USACE initiates any dispute resolution mechanism under these existing agreements as to an issue arising in the context of the BDCP, the initiating agency will communicate that fact to the other parties of this agreement in writing. EPA and the USACE will keep the other Signatory Agencies of this MOU apprised of any developments in the dispute resolution process.

Section VII. Effective Date and Duration

This MOU will become effective on the date of signature by the last party. This MOU shall remain in force, subject to Section II.2, until whichever of these events occurs first: a) the end of the Final EIS 30 day waiting period, b) the MOU is terminated pursuant to Section V.2, or c) 10 years after the date of signature by the last party.

IN WITNESS WHEREOF, this MOU is executed by the U.S. Fish and Wildlife Service, National Marine Fisheries Service, Bureau of Reclamation, California Department of Water Resources, U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency, acting by and through their respective authorized officers.

Michael C Wehr, P.E.
Colonel (P), U.S. Army
South Pacific Division Commander

Jared Blumenfeld
Regional Administrator
U.S. Environmental Protection Agency, Region IX

Date

Donald R. Glaser
Regional Director
Bureau of Reclamation
Mid-Pacific Region

Date

Ren Lohofener
Regional Director
U.S. Fish and Wildlife Service
Pacific Southwest Region

Date

Rodney McInnis
Regional Administrator
National Marine Fisheries Service
Southwest Region

Date

Mark W. Cowin
Acting Director
California Department of Water Resource

Date